Supreme Court, U. S.
FILED
JAN 31 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-883

NEWMAN SIGNS, INC.,
A North Dakota corporation,
Appellant/Petitioner,

v.

WALTER R. HJELLE, as North Dakota State Highway Commissioner,
and the NORTH DAKOTA HIGHWAY CORRIDOR BOARD,
Appellees/Respondents.

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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January 31, 1979

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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I.

INTRODUCTION

The Motion to Dismiss fails to show that the questions presented herein are not substantial and deserving of the plenary consideration of this Court. Appellees in their Motion fail to appreciate the First Amendment interests in

this case, and they fail, as the North Dakota court failed, to apply this Court's precedents and principles when such fundamental rights are involved.

Just as the North Dakota Supreme Court has ignored the vagueness and overbreadth arguments of Appellant, Appellees ignore those arguments. Appellees treat the fundamental right of free speech with little regard following the thinking of the North Dakota Court which said that Appellant's interests are "minimal". (Jur.St. 44a)

Appellant has shown in the Jurisdictional Statement that this case involves more than just commercial speech as defined by this Court. Although Appellees attempt to relegate the case to one of commercial speech alone, and then only to billboards, even their Motion to Dismiss admits that the North Dakota law "affects various types of signs carrying all conceivable kinds of messages". (Motion p. 13) Therefore, this case involves pure speech covering all signs, even those of an individual espousing ideological ideas whose signs are within 660 feet of the nearest edge of the right-of-way and visible from the main traveled way of the state highway system or whose signs are erected beyond 660 feet of the right-of-way but with the purpose of being read from such highway. Those signs fall within the scope of the law whether or not they are in municipalities.

Should this Court not take jurisdiction herein, the law will be left in confusion. Although the sign cases to which this Court has denied plenary consideration may be distinguished on their facts, the status of the law is not clear.

In addition to its other failings, Appellees' motion does not even discuss some of the questions and issues presented in the Jurisdictional Statement. Appellant briefly takes up the following issues which are raised by the Motion in the inverse order as found in the Motion.

II.

WAIVER AND ESTOPPEL ISSUES

If waiver and estoppel are to be considered as issues, then federal standards apply and the facts are controlling. The cases cited in the Motion are not in point. The Appellant could find no case in which the rules of law referred to by the Appellees were applied when fundamental rights are at stake. The facts in this case do not work an estoppel.

In addition to the findings of protest and duress by the North Dakota Supreme Court referred to in the Jurisdictional Statement (see Jur.St. pp. 40. 41, 8a) the trial court found that there was consistent and vigorous hostility to the permit systems, that there was no consent or agreement to the language of the permits, and that the Appellant's choice was to build under the permits or not to build at all. (see Jur. St. 6c, F.O.F. 11) In spite of the fact that the North Dakota Rules of Civil Procedure, Rule 52(a) adopts the federal "clearly erroneous" rule, the North Dakota Supreme Court ignored these findings, did not find the trial court clearly erroneous, and invoked estoppel against the Appellant. However, the North Dakota court did not apply federal standards, nor did it take into consideration that this is a case of encroachment upon fundamental rights.

The trial court, in its conclusions of law, found no estoppel, found an involuntary waiver, and found the attempted regulation by the Commissioner and the Board without effect. Although Appellant implored the North Dakota court to inquire into the authority of the Commissioner to exercise administrative fiat in the attempt to control signs, it ignored the question. The North Dakota court did find, however, that no rules and regulations were

adopted by the Board until August 1, 1973. (see Jur.St. 22a) It also concluded that all signs erected by Appellant under the permit systems prior to August 1, 1973 were lawfully erected.

Although Harold Newman, president of the appellant corporation, was a member of the Highway Corridor Board, he was such a member because the North Dakota law required that a representative of the North Dakota Outdoor Advertising industry be on the Board. (See N.D.C.C. 24-17-06, Jur.St. 15e) It is obvious from the membership of this five-member Board that the member representing the Outdoor Advertising Association was to represent vested interests. As a member of the Board the minutes show Newman immediately protested the adoption of the interim policy proposed by the Board (see Exhibit CB-1, p.6, R.162), and, when the Board was considering acting in response to what were only proposed federal guidelines in 1967, Newman stated that there were no standards and that the Board, which represented the state, did not have to accept those as standards. (See Exhibit CB-1, p.18, R.162)

In addition to the foregoing, the trial court found that confusion, uncertainty, frustration, and ambiguity with respect to the state Act and federal Highway Beautification Act continued to exist from 1967 to 1972. (R. 36, 57, 65, 773, 774, 775, 803, 826, 828, Jur.St. 5c, F.O.F. 7)

The Motion is incorrect in stating that the Commissioner's permit program was adopted pursuant to the "Act" because the Commissioner's efforts to control the conduct of Appellant, and others similarly situated, took place from December of 1965 up to the date on which the North Dakota act was passed in 1967. (Motion, p. 19, Jur.St. App. E.3.a., E.3.b.) As previously shown in the Jurisdictional Statement and herein, the Commissioner's action was blatant and arbitrary disregard of fundamental rights.

This case is not one of election of remedies, nor is it a licensing case in which a business is licensed. There are certain signs for which permits were granted, but there are others which were erected without permits. Each permit was for an individual sign, not for a business.

In *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967) this Court reiterates the standard that waivers of such valued freedoms as freedom of speech will not be sustained "in circumstances which fall short of being clear and compelling". Since it is always in the interest of one who is under duress to choose the lesser of two evils, a choice made according to interest does not exclude duress. *Union Pacific R. Co. v. Public Service Commission,* 248 U.S. 67, 70 (1918) and see *Abie State Bank v. Bryan,* 282 U.S. 765, 775, 776 (1931).

Appellant openly protested and opposed the so-called regulations, so there was no deception and there can be no estoppel when such protests to invalidity of the law are made. *Los Angeles v. Los Angeles City Water Co.,* 177 U.S. 558, 578, 579 (1900).

There are other reasons, too, why waiver and estoppel should not be invoked here:

1. Appellant has argued overbreadth, and even if this Court should consider Appellant to have waived its right to assert the constitutional questions herein, this case raises important questions which should be considered by this Court to resolve the chilling effect which the North Dakota law has on freedom of expression.

2. The North Dakota court applied estoppel to Appellant only against its attack on the Commissioner's regulation and the Board's interim policy. The North Dakota court proceeded to consider the constitutionality of the North Dakota

statutes because it could not find estoppel as to those questions. Therefore, the constitutional questions were reached below and should be considered by this Court.

3. This case involves various categories of signs including signs erected prior to October 22, 1965 which have been expanded and never have been the subject of any regulations, and including signs which were erected after January 1, 1968 for which no permits were sought. Therefore, the questions of the constitutionality of the actions of the Commissioner and the Board are raised by those facts unrelated to any question of whether application for and issuance of permits constitute estoppel.

Irrespective of the above, the estoppel which Appellees assert should be invoked necessitates a benefit to be derived by the Appellant. However, Appellant had the right to be in business prior to the actions of the Commissioner and the Board. That right was coupled with the fundamental right of freedom of speech. The actions of the Commissioner and of the Board could not grant Appellant any further benefit than that which the First Amendment had already insured. Therefore, the attempts at regulation could be nothing more than limitations on Appellant's, and others', fundamental rights. A limitation is not a benefit.

III.

PROCEDURAL DUE PROCESS ISSUES

Lest the Motion mislead this Court, the hearing which the Motion states a sign owner is allowed under N.D.C.C. 24-17-15 is not an administrative hearing but rather only the right to seek judicial review by injunction and judicial

process, a cumbersome and expensive procedure at best. (See Motion, p. 10) The questions raised under the procedural due process question of the Jurisdictional Statement are substantial, and the unconstitutional procedures will continue in use by the administrators of the North Dakota Act if unchecked by this Court.

IV.

FIRST AMENDMENT ISSUES

Standing alone, without qualification, the broad standards set forth in *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748 at 771 (1976) lend themselves nicely to application sustaining vague and overbroad regulations. If it is only necessary not to refer to content, and to state one of the several legitimate purposes which sustains all police power legislation (health, welfare, safety, morals or aesthetics), and to be able to say that the expression may be expressed by some alternate available means, then it would be easy to draft language which would always accomplish the ends sought without constitutionally jeopardizing the means utilized. This is the approach which the North Dakota court has taken and Appellees desire this Court to sustain. However, this Court in *Virginia Pharmacy Board,* supra, did not find it necessary to inquire into the bounds of time, place and manner restrictions and it did qualify the standards set forth by reference to a long line of cases.

Although the North Dakota court made reference to some of those cases, it did so as justification for its opinion, without examination of the application of the principles recited therein to this case, and in an obvious attempt to justify the North Dakota law and state action.

Appellant now briefly takes up, in inverse order, the three-fold criteria relied upon by Appellees in their Motion as stated in *Virginia Pharmacy Board,* supra.

1. *Alternate Channels.* The North Dakota law makes no provision for alternate channels of communication. There is no exception for political, social or any kind of ideological sign. Even in the very restricted areas in which off-premise signs are allowed, the spacing regulations are strict and the cumbersome permit process must be followed. (See App. 44e, 38e, 39e)

It is difficult to understand how a person interested in communicating with the traveling public, whether the communication is commercial or non-commercial, will be able to accomplish that end. This is particularly true in rural areas such as North Dakota. (North Dakota has only one standard metropolitan statistical area.) Certainly television, radio, leaflets, pamphlets or newspapers are not readily, if ever, available for communication with the traveling public on the public thoroughfare. Appellant invites this Court to use its imagination, transporting itself to rural North Dakota, traveling through or between places therein, and looking for information. And, inversely, imagine an individual in North Dakota attempting to communicate, perhaps an ideological idea, to the same traveler.

Appellees rely on *John Donnelly & Sons v. Mallar,* 453 F. Supp. 1272 (D.C.Me. 1978). However, that case is easily distinguishable from the instant case because the legislature there made more specific findings (ibid. 1275, 1276), it provided for official business directional signs (ibid. 1276) and it specifically allowed non-commercial messages conveyed by political, civic and charitable signs (ibid. 1280). Thus, the question of the regulation of signs of private

individuals conveying ideological messages was not at issue there, and alternate means were provided within the Maine statute itself.

2. *Significant Governmental Interest.* Appellees have not provided the Court with any reference to any evidence supporting the governmental interests set forth in the North Dakota Act. There is no such evidence in the record and there are no such findings.

The various purposes as set out in the North Dakota law are reinterated at page 8 of the Motion. In addition to the language Appellees quote, however, N.D.C.C. 24-17-01 states "that both the convenience of travel and the interests of the economy as a whole require a reasonable freedom to advertise", and that "(I)t is the intention of the legislative assembly in this chapter to provide a statutory basis for the regulation, but not the prohibition, of outdoor advertising".

Thus, the North Dakota legislation was purely enabling legislation, and regulations were necessary to implement that enabling legislation. The date Chapter 24-17 of the North Dakota Century Code became law is not so significant as the date that the law was implemented. That date, by decision of the North Dakota court, was not until the rules and regulations were adopted by the Highway Corridor Board on August 1, 1973.

Therefore, it is significant that N.D.C.C. 24-17-09 couples with the purposes set forth in subsection 1 thereof and quoted by Appellees, the mandate that the Board "shall enact suitable regulations to carry out the purposes of this chapter." The Board did not have regulations until August 1, 1973; it has never established any zoning district; and it has never adopted a comprehensive plan and design. N.D.C.C. 24-17-09, App. 16e, 17e, 18e. The agreement referred to in N.D.C.C. 24-17-09 (2)(f) was not entered into until January 19, 1972.

Appellant does not concede that the North Dakota law is now constitutionally sound, but for the sake of argument, it has consistently contended alternatively that there could not possibly have been constitutional regulation prior to August 1, 1973 and that all signs erected prior to that date were lawfully erected.

The North Dakota law cannot sustain the attack under the questions presented to this Court. The case of *Kovacs v. Cooper,* 336 U.S. 77 (1949) cited by Appellees supports Appellant's position. The case is an example of closely drawn legislation furthering a subordinating interest which is compelling. Not all sound trucks were prohibited, but only those reaching a certain decibel limitation.

To affirm the decision in this case, or to dismiss this appeal, will create a conflict between this case and that of *Baldwin v. Redwood City,* 540 F.2d 1360 (9th Cir. 1976), *cert. denied,* 431 U.S. 913 (1977) where the Court said at page 1366 that signs are "virtually pure speech". The instant case is no less a regulation of political speech than the Redwood City Ordinance. That case illustrates not only the burden on freedom of speech that such regulation interposes, but also suggests the degree of narrowly drawn specificity such regulation can and should have.

3. *Regulation of Content.* The terms "off-premise" and "on-premise" are misleading. They would appear to relate to location, but they really relate to content. It is the content of the sign, not its location, which places it within one category or the other. Two signs can be located in the same location, they can be of the same size and type, and they can be intended to convey their message to the same recipients. However, one, because its content conveys a message with respect to the property upon which it is located, is an on-

premise sign, while the other, because it contains content which conveys a message not related to the property upon which it is located, is off-premise. The key to the distinction is content. Regulation based on that distinction is therefore justified by reference to content. Thus the North Dakota Act fails this test. (See N.D.C.C. 24-17-03 and 24-17-03.1, Jur.St. 11e, 12e, 13e)

Query: If this appeal is dismissed, or the decision is affirmed, can the leaflet, pamphlet, armband, picket, or loudspeaker, in the name of a "legitimate" state interest unsupported by the record or findings, because other channels are available, be regulated by generally allowing them only if their content relates to the location of their use, but be prohibited or strictly limited from access to the public thoroughfare if their content does not relate to the location of their use?

V.

CONCLUSION

For the reasons set forth in the Jurisdictional Statement and in this Brief, the motion should be denied, probable jurisdiction should be noted, or in the alternative certiorari granted, and the case should be set for consideration on its merits.

Respectfully submitted,

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